BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ANTONIO REYES, JR.	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,002,649
METAL IMPROVEMENT COMPANY, INC.	)	
Respondent	)	
AND	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the April 16, 2002 preliminary hearing Order of Administrative Law Judge John D. Clark.

ISSUES

In its application to the Appeals Board (Board), respondent raised the issues contesting whether claimant suffered accidental injury arising out of and in the course of his employment on the date or dates alleged and whether claimant provided timely notice of accident. Additionally, in its brief, respondent argued that the appropriate date of accident was also at issue. Claimant contends he suffered a series of accidental injuries beginning January 2002 and continuing through March 4, 2002, when he advised his division manager, Richard Randleman, of his back problems. Under claimant's scenario, notice would be timely if a series of accidents is, indeed, proven. Therefore, the issues for the Board's consideration are:

(1) Did claimant suffer accidental injury arising out of and in the course of his employment on the date or dates alleged?

(2) Did claimant provide timely notice of accident?

(3) What is the appropriate date of accident?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Board finds the Order of the Administrative Law Judge should be affirmed.

The Order does not specifically discuss whether claimant provided timely notice, but the Board assumes for preliminary hearing purposes, since the Administrative Law Judge ordered benefits, that notice was decided in claimant's favor.

Claimant alleges he suffered accidental injury to his low back through a series of accidents beginning in January 2002. Claimant, a four-year employee with respondent, worked as a former, which required substantial lifting, bending and stooping. He began experiencing back pain in January of 2002, with no specific traumatic injury noted. Claimant testified that his back continued to worsen over time.

On January 23, 2002, claimant discussed his problems with Randy Bloxham, his plant manager. However, claimant failed to advise Mr. Bloxham that his back injuries were work related.

Claimant also alleges that he told his lead man, Richard Cabrerra, of his problems in January 2002. Claimant testified he advised Mr. Cabrerra that his problems were related to his work. However, Mr. Randleman discussed the situation with Mr. Cabrerra, who could only recall claimant alleging problems with his shoulder. There was no indication that claimant advised Mr. Cabrerra of back complaints.

Respondent does not dispute that claimant talked to Mr. Randleman, their division manager, on March 4, 2002. At that time, claimant advised him not only of the back symptoms, but also of the fact that they were related to his employment. The issue, therefore, becomes did claimant suffer accidental injury as the result of either a specific trauma in January or through a series of microtraumas.

Claimant is the only person who testified regarding his physical complaints. He advised that his problems began in January 2002 and continued to worsen due to his work through March 4, 2002, when he talked to Mr. Randleman.

In dealing with the issue of the appropriate date of injury for a repetitive trauma injury, the Kansas appellate courts have on several occasions attempted to establish rules to identify the appropriate date of accident. Beginning with Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994), and continuing through the more recent case of Treaster v. Dillon Companies, Inc., 267 Kan. 610, 987 P.2d 325 (1999), the preferable date would be the last date worked on a particular job. However, in this

instance, there is no indication that claimant has ceased employment with respondent. Therefore, the date of accident will be a date less certain.

The courts have also utilized the last date worked at a regular job before being provided accommodation as being an appropriate date of accident in certain circumstances. Treaster, *supra*. In this instance, claimant testified he continued performing his regular duties through March 4, 2002, when he talked to Mr. Randleman. At that time, respondent began accommodating claimant's restrictions and limiting the amount of lifting he was required to perform. The Board, therefore, finds an appropriate date of accident in this instance, pursuant to Treaster, to be March 4, 2002, when claimant talked to Mr. Randleman. At that time, claimant's work duties were modified and accommodated employment was provided. In so finding, the Board resolves the issues of whether claimant suffered accidental injury arising out of and in the course of his employment, the appropriate date of accident and whether timely notice was provided. Claimant's conversation with Mr. Randleman on March 4 would be timely notice, under K.S.A. 44-520, of an accident through that date.

The Board finds that claimant has proven for preliminary hearing purposes the necessary elements to justify the award of benefits. The Order of the Administrative Law Judge should, therefore, be affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge John D. Clark dated April 16, 2002, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of June 2002.

BOARD MEMBER

c: David H. Farris, Attorney for Claimant
Brian R. Collignon, Attorney for Respondent
John D. Clark, Administrative Law Judge
Philip S. Harness, Director